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In the Supreme Court of the United States

No. 1370

OCTOBER TERM, 1970.

ALICE MARIE LAMP,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION

and

DEN NORSKE AMERIKALINJE A/S,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

VICTOR G. HANSON,
15929 West Seven Mile Road,
Detroit, Michigan 48235,

NED L. MANN,
1124 Hanna Building,
Cleveland, Ohio 44115,

ROBERT L. JASON,
Alpena, Michigan,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, made and entered December 23, 1970.

OPINIONS BELOW.

The petitioner, Alice Marie Lamp, is the administratrix of the Estate of Frank Donald Lamp, chief engineer of the Cedarville, who died when the vessel sank on May 7, 1965.

After admission of liability by the shipowners, the Hon. James C. Connell referred the determination of damages in the Lamp claim to Oliver C. Schroeder, commissioner. The commissioner's report and opinion, insofar as the Lamp claim is concerned, was adopted by the District

Court and judgment entered thereon on May 7, 1969. The commissioner's report is reprinted in the Appendix.

An appeal was perfected to the United States Circuit Court of Appeals for the Sixth Circuit, which affirmed in part and reversed in part, and ordered the judgment vacated and remanded the cause to the District Court for further proceedings in conformity with its opinion.

The opinion of the Circuit Court is reprinted in the Appendix, and appears in the advance sheets for December 23, 1970.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Sixth Circuit was made and entered December 23, 1970. Jurisdiction of this Court is invoked under favor of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED.

1. Is the determination of the allowance of prejudgment interest in an admiralty case addressed solely to the discretion of the trial court?

2. May the Circuit Court, absent a finding of abuse of discretion, substitute its judgment for that of the trial court in the determination of allowance of prejudgment interest?

3. Should the rule of discount for future damages (*Chesapeake & Ohio Ry. v. Kelly,* 241 U.S. 485, 491 (1916)) be modified as a matter of fairness in admiralty injury and death cases, so that prejudgment interest must be allowed upon a finding of liability from date of incident to date of entry of judgment?

STATUTES INVOLVED.

The Jones Act.

46 U.S.C. 688:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Death on the High Seas Act.

46 U.S.C. 761:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

46 U.S.C. 762:

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the

persons for whose benefit the suit is brought and shall be appointed among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Federal Employers' Liability Act.

45 U.S.C. 51:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. 59:

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

STATEMENT OF THE CASE.

Commissioner Schroeder had found the Lamp family entitled to recover the sum of $452,084, from both shipowners, United States Steel Corporation and Den Norske Amerikalinje. The District Court entered judgment thereon. On appeal, the Circuit Court disallowed several items of damages in all of the death claims, including the Lamp claim, one of which was prejudgment interest from date of death to date of entry of judgment.

Petitioner Lamp raises no issue as to the disallowance of any element of damage other than prejudgment interest.

Both U. S. Steel and Den Norske had admitted liability for all compensatory damages. The deaths occurred on May 7, 1965. The District Court entered judgment four years later. During the entire period the shipowners were in possession of the funds admittedly due the claimants. The appeal has postponed payment even to this date.

Recognizing this fact, after the four-year delay, the District Court allowed prejudgment interest.

The Circuit Court reversing, stated:

> "* * * they represent instances of the Commissioners' clear disregard of well established law of this Circuit. * * * Such an award of prejudgment interest was error. *Cleveland Tankers, Inc. v. Tierney,* 169 F.2d 622 (6th Cir. 1948)."

REASONS FOR GRANTING THE WRIT.

1. The judgment of the Circuit Court is in violation of the rule laid down by this Court in *The Scotland,* 118 U.S. 507 at p. 518-519.

2. The judgment of the Circuit Court for the Sixth Circuit is in conflict with the very case it cited as authority for its decision. (*Cleveland Tankers v. Tierney,* 169 F.2d 622)

3. The judgment of the Circuit Court is in direct conflict with that in the Second Circuit in *Petition of the City of New York,* 332 F.2d 1006; *O'Donnell Transport Co. v. City of New York,* 215 F.2d 92; *The Wright,* 109 F.2d 699, and *Moore McCormack v. Richardson,* 295 F.2d 583.

4. The effect of the judgment by the Circuit Court is to reward dilatory defendants by permitting them to use money due the plaintiffs during the lengthy period of litigation delays and to encourage them to file successive appeals.

QUESTION NO. 1.

Is the determination of the allowance of prejudgment interest in an admiralty case addressed solely to the discretion of the trial court?

1. The judgment of the Circuit Court is in violation of the rule laid down by this Court in The Scotland, 118 U.S. 507 at p. 518-519.

In 1886, this Court laid down a basic rule as to the allowance of prejudgment interest. While apparently in disagreement with the Circuit Court, which had disallowed interest, this Court stated:

> "The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case,

> and rests very much in the discretion of the tribunal which has had to pass upon the subject, whether it be a court or a jury. * * * it is sufficient to say that the Circuit Court, so far as we have anything before us to show the contrary, may have had very good reasons for not allowing interest on the value of the strippings. We are not disposed to disturb its decree in this respect."

The rule, therefore, is that prejudgment interest is a matter which lies within the sound discretion of the trier of the facts and that there is no set rule for its allowance, each decision being based on the circumstances of that case.

The Circuit Court failed to follow *The Scotland* rule insofar as it held "Such an award of prejudgment interest was error."

2. The judgment of the Court of Appeals for the Sixth Circuit is in conflict with the very case it cited as authority for its decision.

The Circuit Court failed to follow the rule in its cited case. *Cleveland Tankers* merely restated the rule of *The Scotland.* The Circuit Court merely refused to set aside the judgment of the trial court which had refused to allow prejudgment interest.

The Circuit Court also disregarded its own decision, made six months earlier, in *Reiss Steamship Company v. United States Steel Corporation,* 427 F.2d 1152.

In that case, the Circuit Court, correctly stated the rule laid down by *The Scotland.*

It stated:

> "This Court has approved denial of prejudgment interest in a 'solely at fault' case involving property damage, Great Lakes Towing Co. v. Kelley Island

Lime & Transport Co., 176 F. 492 (6th Cir. 1910), and in a personal injury action, Cleveland Tankers v. Tierney, 169 F.2d 622 (6th Cir. 1948). In Great Lakes Towing Co., however, we stated that the rule as to the awarding of prejudgment interest was not a fixed one but rested within the discretion of the Court and would not be reviewed unless it has been 'palpably abused.' 176 F. at 498.

An award of prejudgment interest is generally within the discretion of the Court. The Scotland, 118 U.S. 507, 518-519, 6 S.Ct. 1174, 30 L.Ed. 153 (1886); O'Donnell Transport Co. v. City of New York, 215 F.2d 92, 95 (2d Cir. 1954); The Wright, 109 F.2d 699 (2d Cir. 1940); Kawaski Zosensho v. Cosulich Societa Triestina di Navigazione, 11 F.2d 836 (5th Cir. 1926)."

3. The judgment of the Circuit Court is in direct conflict with that in the Second Circuit in Petition of the City of New York, 332 F.2d 1006; O'Donnell Transport Co. vs. City of New York, 215 F.2d 92; The Wright, 109 F.2d 699, and Moore McCormack vs. Richardson, 295 F.2d 583.

The impelling need for a uniform rule is demonstrated by the recent cases decided by the Second Circuit.

One of the more recent of its decisions on the question of the allowances of prejudgment interest was *Petition of the City of New York,* 332 F.2d 1006 (1964), wherein the court stated:

"Of the 18 claimants only Texaco's claim was based on a property loss rather than personal injury. The City of New York asserts that an admiralty court has no power to allow prejudgment interest in a personal injury claim. We disagree. It has long been held proper for admiralty courts fully to restore the injured party to his condition at the time of injury by

allowing and fixing prejudgment interest from the date of the loss in proceedings involving property damage. The Manhattan, 85 F.2d 427 (3 Cir. 1936), cert. denied, sub nom. United States v. The Bessemer, 300 U.S. 654, 57 S.Ct. 432, 81 L.Ed. 864 (1936); The President Madison, 91 F.2d 835 (9 Cir. 1937); The Wright, 109 F.2d 699 (2 Cir. 1940); Geotechnical Corp. of Delaware v. Pure Oil Co., 214 F.2d 476 (5 Cir. 1954). Traditionally, at common law prejudgment interest on an unliquidated tort claim is not allowed. See Moore-McCormack Lines, Inc. v. Amirault, 202 F.2d 893 (1 Cir. 1953). More recently, it has been determined that those who obtain awards resulting from deaths of crew members who died in maritime accident are entitled to prejudgment interest. National Airlines, Inc. v. Stiles, 268 F.2d 400 (5 Cir. 1959); Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2 Cir. 1961), cert. denied, 368 U.S. 989, 82 S.Ct. 606, 7 L.Ed.2d 526 (1962). We said in the Moore-McCormack case that 'when a court fixes damages to compensate for a loss which occurred in the past, there should be some allowance for the period between the date of the loss and the date of judgment. Recompense may thus be given for the further loss in the postponement of the receipt of compensation. In all too many instances the delay in reaching cases for trial brings suffering and privation to those who were dependent on the deceased. Even the more fortunate of the bereaved may have been forced to borrow money at interest to meet their expenses. * * * [T]he defendants who are ultimately directed to pay have had the use of the money declared to be due. * * *' Supra at 594. It is the combination of these two elements, the immediate loss to the plaintiff and the delay in the payment of compensation by the defendant that warrants the granting of prejudgment interest as a proper element of damages in fixing the loss to the dependents of decedents who bring suit in a court of admiralty."

It is apparent the rule of allowance, as appears by the cases cited, is followed in the Fifth Circuit and the Ninth Circuit. Hence, the ruling that the "award of prejudgment interest was error" is in direct conflict with those circuits as well.

It further conflicts with the holding in the Fourth Circuit in *Gardner v. National Bulk Carriers, Inc.*, 333 F.2d 583.

4. The effect of the judgment by the Circuit Court is to reward defendants by permitting them to use money due the plaintiffs during the lengthy period of litigation delays and to encourage them to file successive appeals.

Mr. Lamp died on May 7, 1965. Shortly after the hearings got under way in Cleveland, both shipowners admitted liability.

Four years passed before the trial court was able to determine the extent of liability. During that period, the shipowners were in possession of the funds which belonged to the victims of the tragedy.

At simple interest, they had reduced their loss by approximately 25%, the rate at which their money earned interest for four years.

Two more years passed during the time the appeals were perfected and decided. It is now almost six years since the sinking. The shipowners still have the funds which belong to the families of those who died.

The judgment debtor is rewarded by the delays of litigation and appeal. The victims of injury and the families of the dead can never receive just compensation since the compensation fund remains in the hands of the wrongdoer, earning interest, the same interest which the injured plaintiffs would have realized had they had possession of the judgment fund during litigation period.

QUESTION NO. 2.

May the Circuit Court, absent a finding of abuse of discretion, substitute its judgment for that of the trial court in the determination of allowance of prejudgment interest?

Under the uniform rule, to which this case appears to be an exception, allowance of prejudgment interest lies within the sound discretion of the trial court.

In the absence of a finding of abuse of discretion the reviewing court has no right to substitute its judgment for that of the trier of the facts.

In the instant review, the Sixth Circuit merely determined the allowance of prejudgment interest was "error." It made that assertion as though some rule of law existed in the Sixth Circuit which required disallowance of prejudgment interest. It did not find the trial court had abused its discretion in allowing prejudgment interest.

QUESTION NO. 3.

Should the rule of discount for future damages (Chesapeake & Ohio Ry. v. Kelly, 241 U.S. 485, 491 (1916)) be modified as a matter of fairness in admiralty injury and death cases, so that prejudgment interest must be allowed upon a finding of liability from date of incident to date of entry of judgment?

The petitioner urges the time is *now* to establish a rule of justice and equity. This Court, on the one hand, should not enforce a rule which requires that awards for future losses be discounted to present value; and, at the same time, refuse to acknowledge the loss of the earning power of the money to which an injured seaman or the family of one killed, were entitled from the date of the injury or death to the day when the award actually is paid. The money remains in the hands of the wrongdoer.

Unless a new rule is promulgated by this Court, requiring the allowance of prejudgment interest in any maritime injury or death from date of incident to date of actual award payment, where liability has been established, every defendant will profit by delay.

If prejudgment interest is mandatory, there will be every inducement and incentive to settle controversies before trial. The rule will have the salutary effect of reducing the case load burden upon the courts. It will give the injured parties relief from the hardships of delay occasioned by extended litigation.

CONCLUSION.

The rule of mandatory allowance of prejudgment interest is long overdue.

It is necessary to relieve the injured seaman and families of those killed from the economic hardships which they are unprepared to face during the long period of litigation.

It will induce early settlements.

It will deprive wrongdoing defendants of the rewards which flow from delay.

The history of this litigation demonstrates the necessity for the rule for which we contend. Mrs. Lamp has been waiting almost six years to receive payment of what admittedly is due her and her family. If she had had the funds in hand, they would have been earning interest. The wrongdoers have been collecting the interest due her.

If just compensation is to be given for the wrong done the Lamp family (and every other victim of maritime tort), prejudgment interest should and must be allowed from the day the wrong was committed to the date of receipt of the compensation due.

Respectfully submitted,

VICTOR G. HANSON,
NED L. MANN,
ROBERT L. JASON,
Counsel for Petitioner.